

87-1452

No. _____

Supreme Court, U.S.

FILED

MAR 1 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THOMAS J. WISE, et al

v.

ARLINGTON COUNTY, VIRGINIA, et al

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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30.17

QUESTIONS PRESENTED

Whether the promotional aspects of an agreement entered into between Arlington County, Virginia and seven black police officers violated the rights of white police officers as secured by 42 U.S.C. Section 1981 and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the Court of Appeals were as follows: Thomas J. Wise and Terence P. Murray, plaintiffs-appellants; Arlington County, Virginia, Larry J. Brown, County Manager; Alan V. Christenson, Director of Personnel, and William K. Stover, Chief of Police, defendants-appellees.



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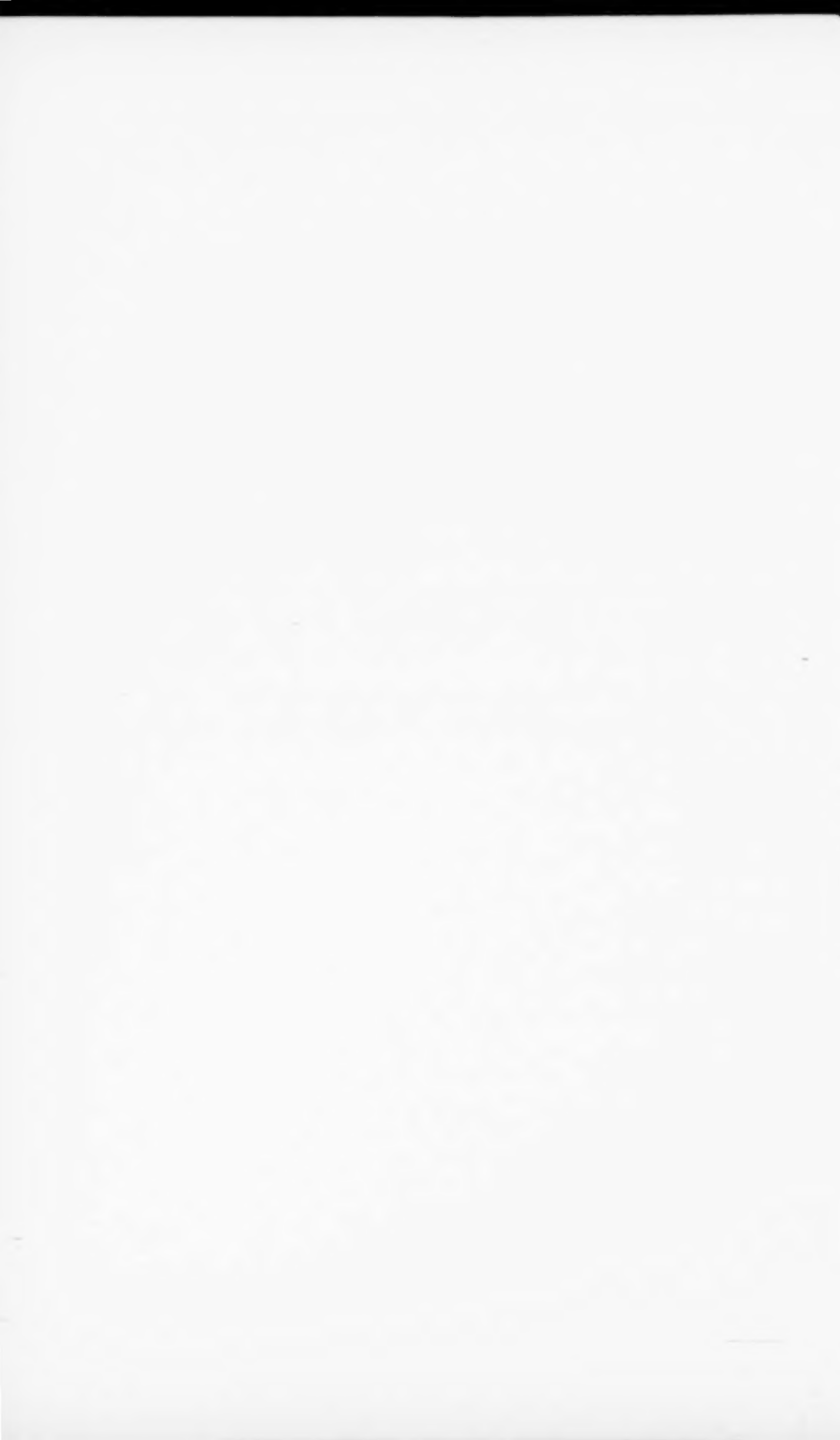
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THOMAS J. WISE, et al

Appellants

v.

ARLINGTON COUNTY, VIRGINIA, et al

Appellees

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Thomas J. Wise and Terence P. Murray
petition for a writ of certiorari to
review the judgment of the United States
Court of Appeals for the Fourth Circuit
in these cases.



OPINIONS BELOW

Final judgment was entered by order without opinion by the Court of Appeals, and appears as Appendix A herein (p.18). The memorandum orders entered against the petitioners in the United States District Court appear as Appendices B and C herein. (pp. 18 and 19).

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

I. Material Proceedings Below.

On March 4, 1985, petitioner, Thomas J. Wise, a white police officer employed by Arlington County, Virginia, filed a Complaint in the United States District



Court for the Eastern District of Virginia at Alexandria, seeking to enjoin Arlington County from implementing a promotional scheme mandated by an agreement entered into between the County and seven black police officers. The original complaint alleged violations of the plaintiff's rights as secured by Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sections 2000e-5 et seq; and 42 U.S.C. 1983, 1985(3), and the Fourteenth Amendment to the Constitution of the United States.

On March 8, 1985, the plaintiff's motion for temporary restraining order was denied. On April 26, 1985, the original complaint was amended to allege violations of the plaintiff's rights under 42 U.S.C. 1981.

By order entered on May 10, 1985, the District Court granted the defendants



partial summary judgment leaving only the plaintiff's claims under 42 U.S.C. 1981 and 1983. (App. D, p.23)

On August 2, 1985, the District Court granted summary judgment on the remaining claims. (App. B p.20)

On March 7, 1986, while the order entered by the District Court on August 2, 1985 was pending appeal, the second petitioner, Terence P. Murray, filed a complaint similar to the first one, however, he also alleged that the promotional practices being implemented by the County violated his rights as secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Summary judgment was granted against the plaintiff by the same District Court on



June 20, 1986. Murray also sought and perfected an appeal to the United States Court of Appeals for the Fourth Circuit.

By order of the Court of Appeals, the two appeals were consolidated.

(App.E, p.25).

After hearing argument en banc, the judgments of the District Court were affirmed by an equally divided court.

(App. A, p.18).

II. Factual Background.

On April 26, 1983, seven Black police officers filed charges with the Equal Employment Opportunity Commission alleging that Arlington County had engaged in a number of unlawful employment practices.

On July 17, 1984, the E.E.O.C. issued a determination that concluded



that there was reasonable cause to believe that Arlington County, Virginia had engaged in such practices by administering a pre-promotional examination that operated to exclude blacks and other minorities as a class from promotion to supervisory ranks in the Police Department. This determination was apparently founded upon a statistical analysis and expert testimony that supported the contention that the pre-promotional test was not validated.

As a result of the E.E.O.C. determination, in December 1984, Arlington County and the seven Black police officers entered into a Settlement Agreement. It is the substance and effect of that Agreement which forms the



subject matter of the present litigation.

Primarily at issue are paragraphs 6.a and 14. of the Agreement. Paragraph 6.a provides, in pertinent part, that the "first two openings for the rank of Corporal shall be filled immediately after the next Corporal examination ... with two black incumbent officers" (emphasis added).

Paragraph 14 of the Agreement sets forth an "accelerated" promotional system for police officers. According to this system, promotions from police officer to Corporal would be made from a pool consisting of the following individuals:

1. Those candidates whose test scores were in the top twenty percent;
2. The top three Blacks, women and possibly other groups of underrepresented

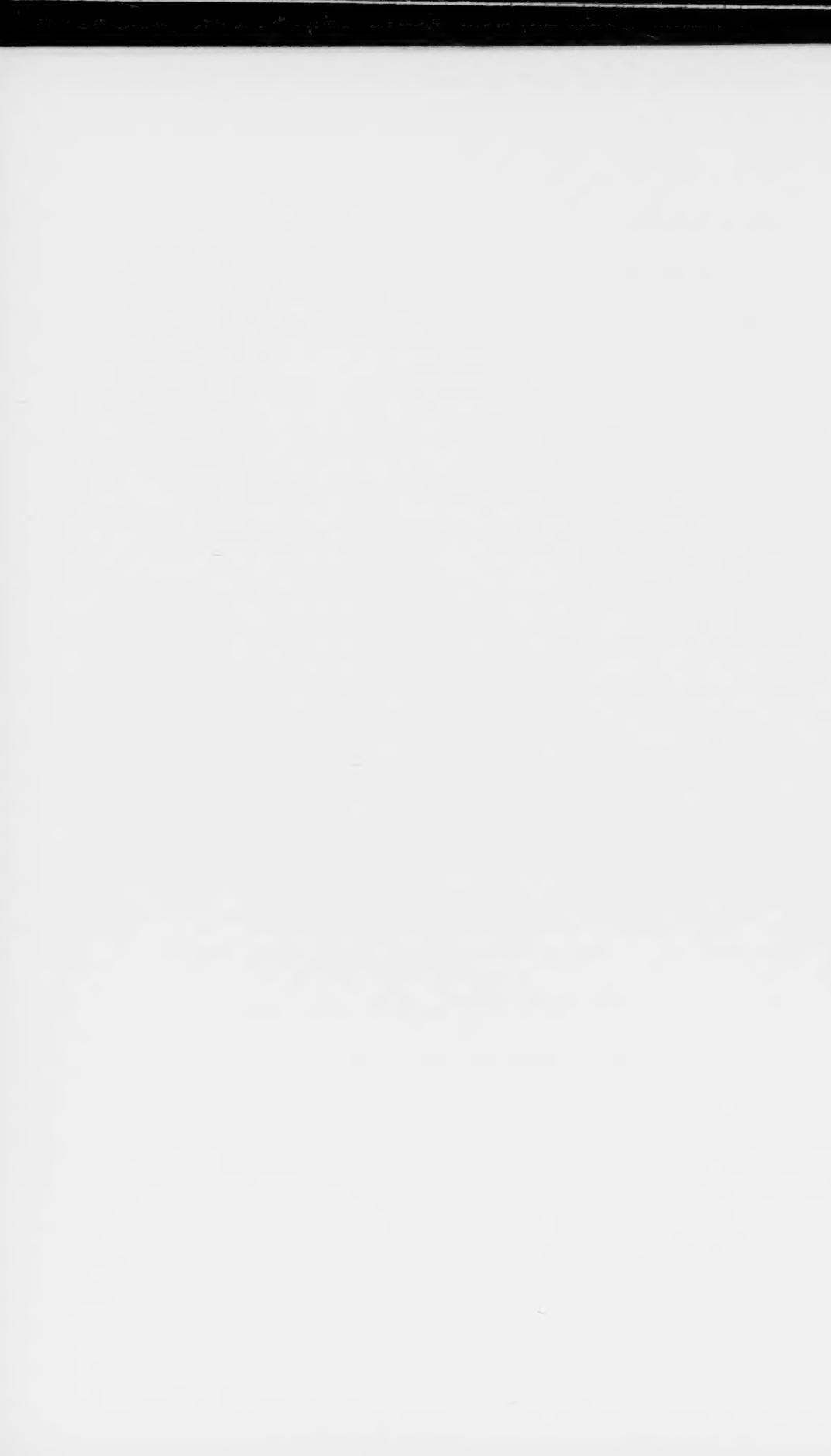


minorities.

This scheme would operate until such time as Arlington County achieved its 5/3/3 goal.

The results of the corporal examination administered in December 1984 gave each candidate who passed the examination a rank, from one (1) to seventy-nine (79) with several instances of a tie. This list was headed: "ELIGIBLE LIST".

From that list, two lists of individuals "certified" for promotion were compiled somewhat in accordance with the terms of paragraph 14 of the Agreement. The first list included those candidates who scored in the top twenty percent of all examinees. This included ranks from the Eligible List from one (1) through twelve (12). The second list was



comprised solely of the top three scoring Black male police officers. The ranks from the eligible list for those three officers were twelve (12), twenty-six (26) and thirty-three (33). The Black police officer who had a ranking of twelve (12) was on both lists, and was the only one of the original seven charging parties to be considered for promotion.

There was no requirement that promotions from the described pool be made in any order or with regard to the rank arising from the test scores.

Appellant, Thomas J. Wise, ranked twenty-second (22) and was thus not "certified for promotion while two Black police officers, both with less seniority and experience than Wise were "certified"



and were promoted to corporal.

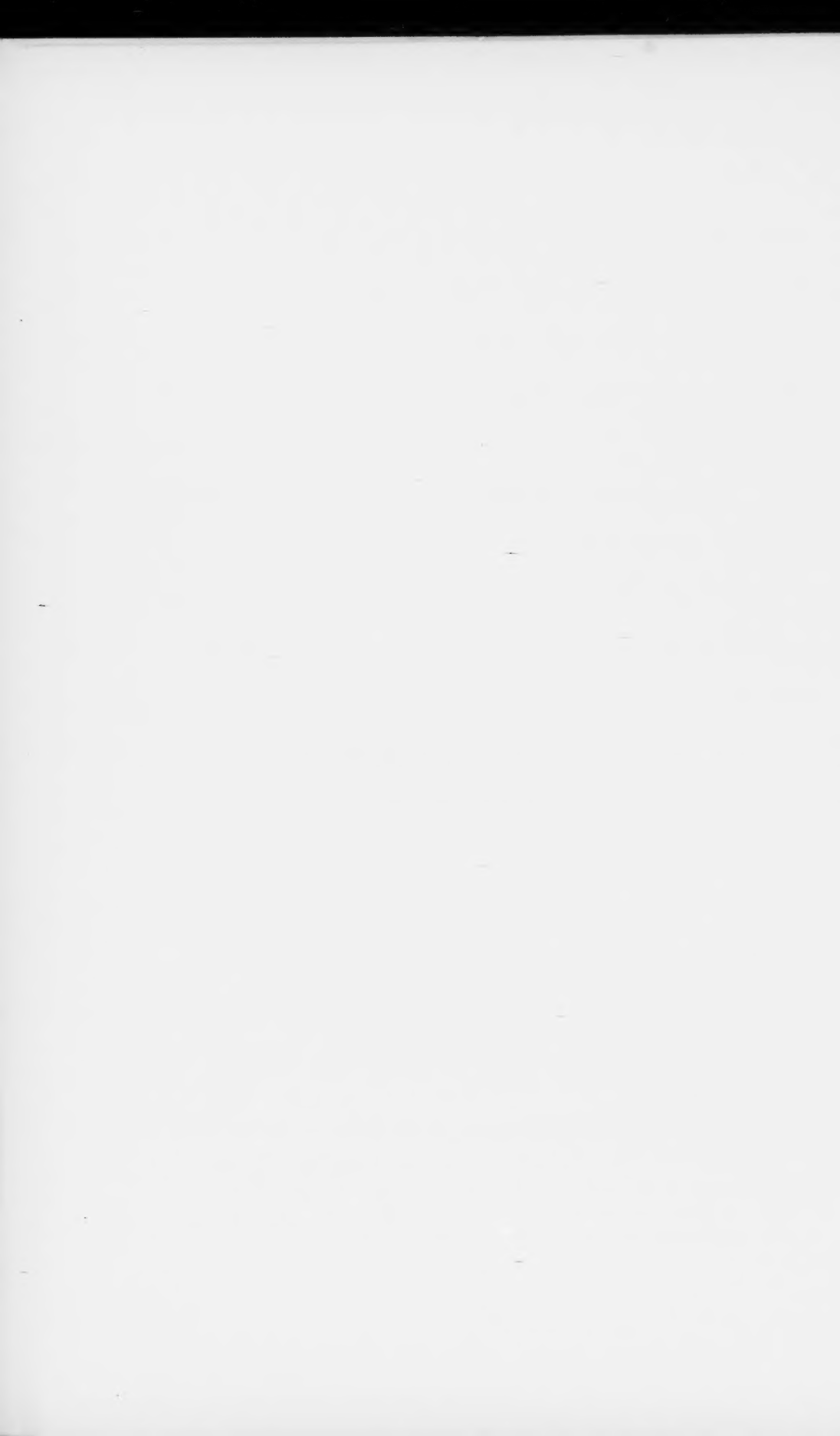
Undeniably, but for the race of the latter candidates, they would not have been considered or promoted at the time they were.

Appellant, Terence P. Murray, ranked second on the first list of certified candidates. After the first round of promotions from the list, Murray ranked number one on the "certified" list.

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial and recurring importance with respect to the limits to which a voluntary affirmative action program may go consistent with the Fourteenth Amendment to the Constitution of the\1

1 Appellant, Murray, also ranked first on the promotion list arising from the 1982 examination for corporal at the time that promotions from that list were frozen.



United States and 42 U.S.C. §1981. The precise issues involved here fall squarely between this Court's recent rulings in the cases of Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) Johnson v. Transportation Agency of Santa Clara, 477 U.S. ____ (1987), and United States v. Paradise, 476 U.S. 1145 (1987). Additionally, the issues were resolved in the Court of Appeals for the Fourth Circuit by an equally divided Court.

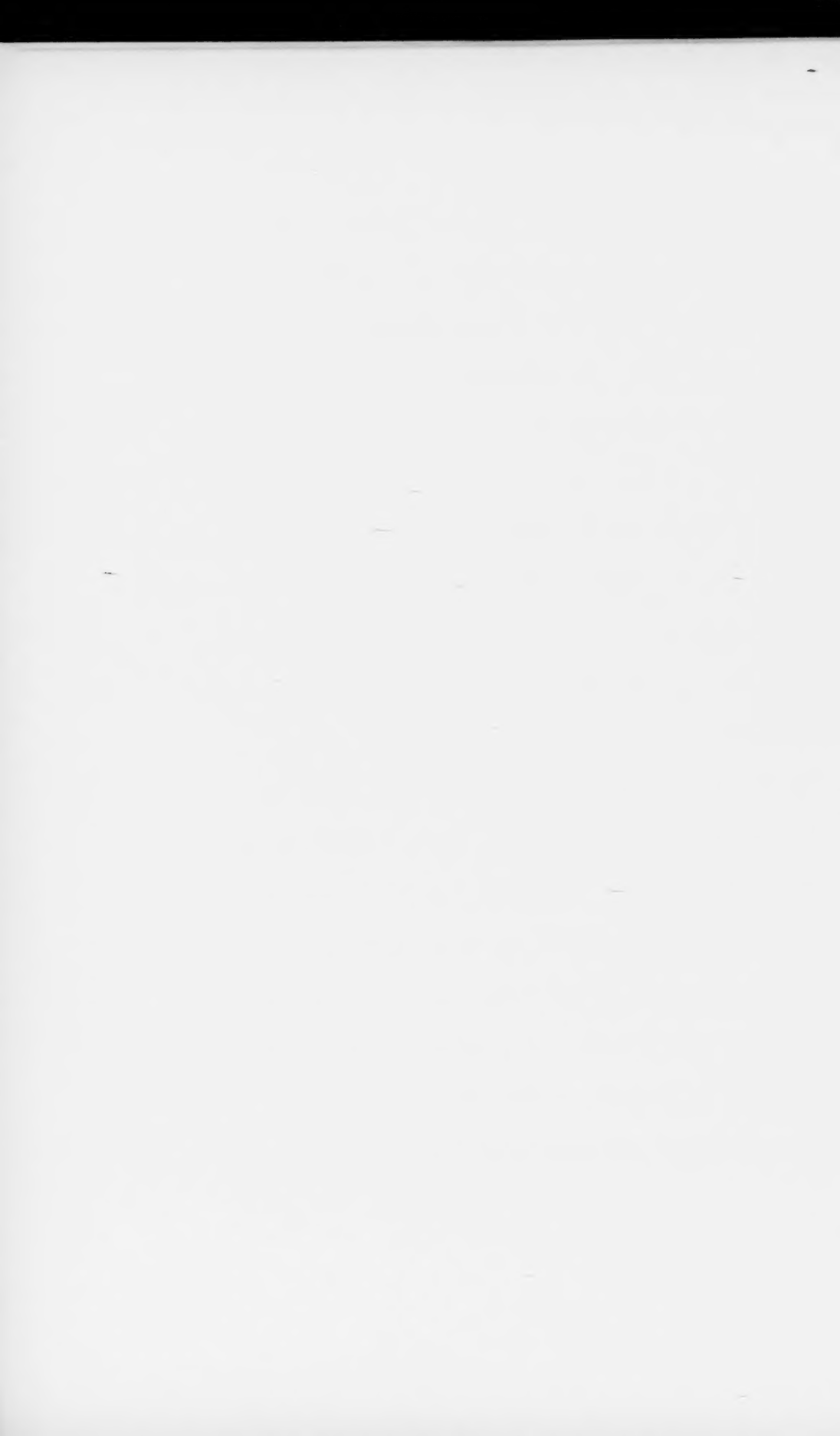
This Court in Wygant, supra, stressed the importance of "[e]videntiary support for the conclusion that remedial action is warranted," whereas in the present actions, all claims were dismissed on motions for summary judgment.

In Johnson v. Transportation Agency of Santa Clara, this Court reviewed a voluntary affirmative action plan quite



similar to that at issue here. The plan was designed to achieve a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Transportation Agency in all major job classifications where they were underrepresented.

As a result of the plan, in deciding promotions, the party responsible for making the promotion was able to consider an applicant's sex as one, of many, factors in determining who should be promoted. In Johnson, the Director of the Agency was given a list of seven names, each person on the list being eligible and qualified for promotion. The list included Johnson, a male, and Joyce, a female. The female was promoted and Johnson challenged the promotion



under Title VII. Significantly, no one was displaced from the eligible list due to the inclusion of Joyce's name thereon. Thus, the procedure was essentially indistinguishable from the promotional scheme at issue in Bushey v. New York State Civil Service Commission, 733 F.2d 220 (2nd Cir. 1984).

In upholding the plan, this Court recognized as significant a factor not present in the Settlement Agreement and the facts at issue here:

"The Agency's plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented."2

2

There is no indication from the record here, what, if any, consideration may be given to race in determining who to promote to corporal, and thus the District Court ruled on the issue without making the findings required by Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).



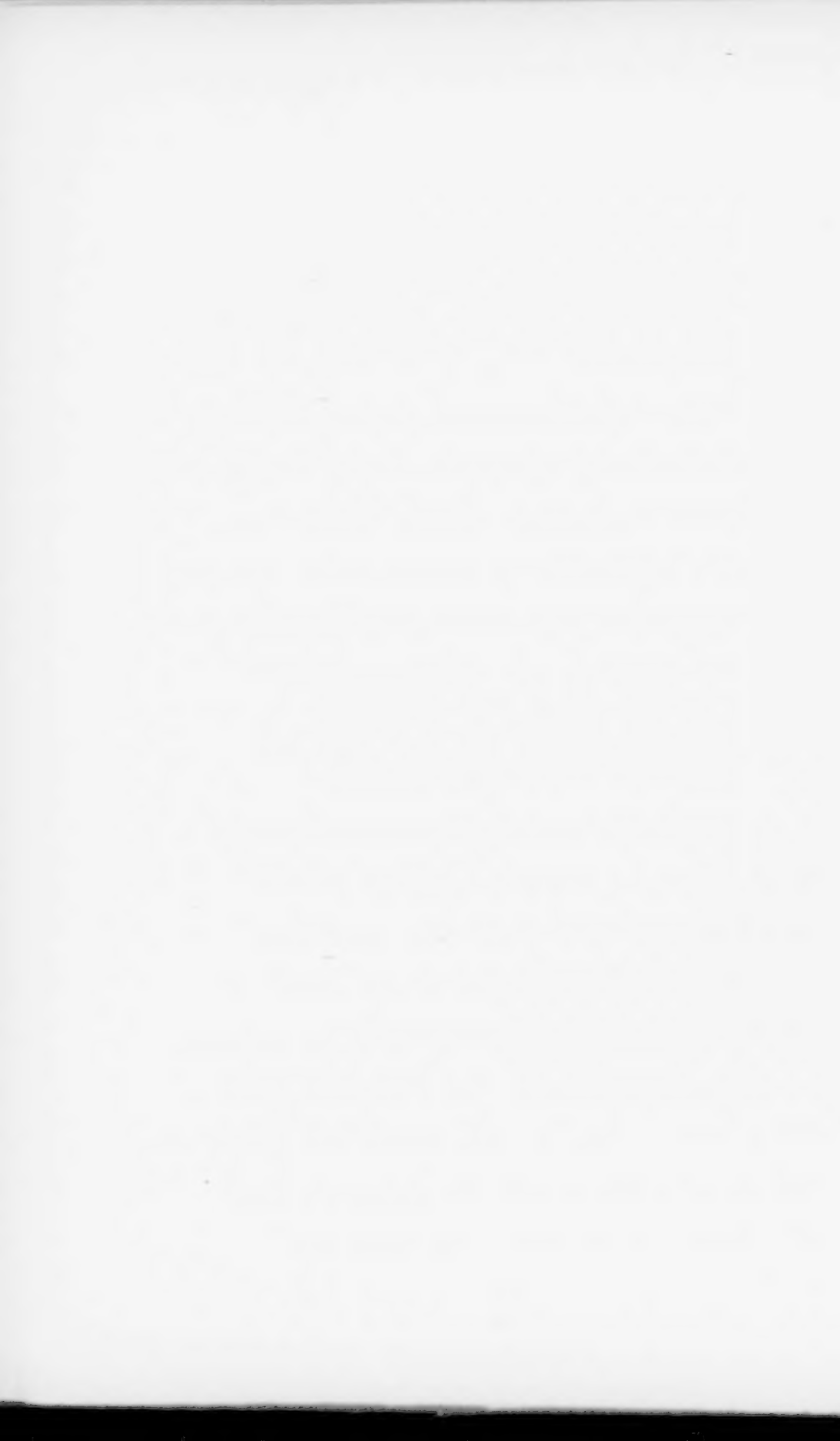
Further, the Court observed:

"The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified candidates for a position."

And, most importantly, and in accordance with the promotional scheme sustained in Bushey, supra, under the Agency's affirmative action plan, (unlike the Settlement Agreement at issue here):

"No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.

Also, the promotion sustained by this Court in Johnson, supra, is indistinguishable from the promotion reviewed by the U.S. District Court of Appeals for the Fourth Circuit in Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981). There, the promotion under review and the scheme by which it was effected did not rely, as does the

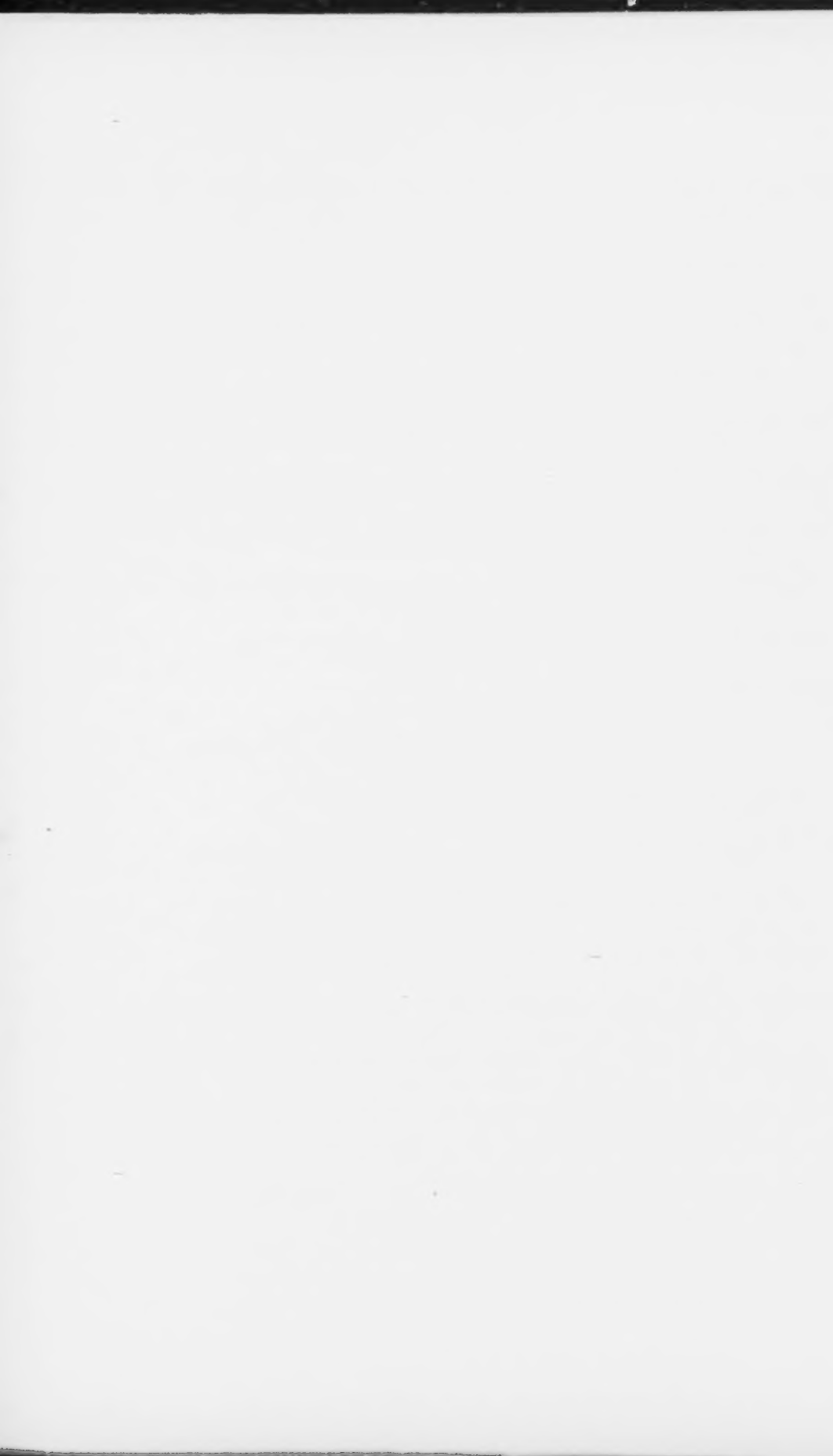


Settlement Agreement here, solely upon race, and the list generated for promotion did not exclude or displace nonminorities for consideration for promotion./3 Again, the Appellant herein had a long-standing expectation of an equal opportunity to advance into the supervisory ranks, an opportunity he had earned by his many years of dedicated service.

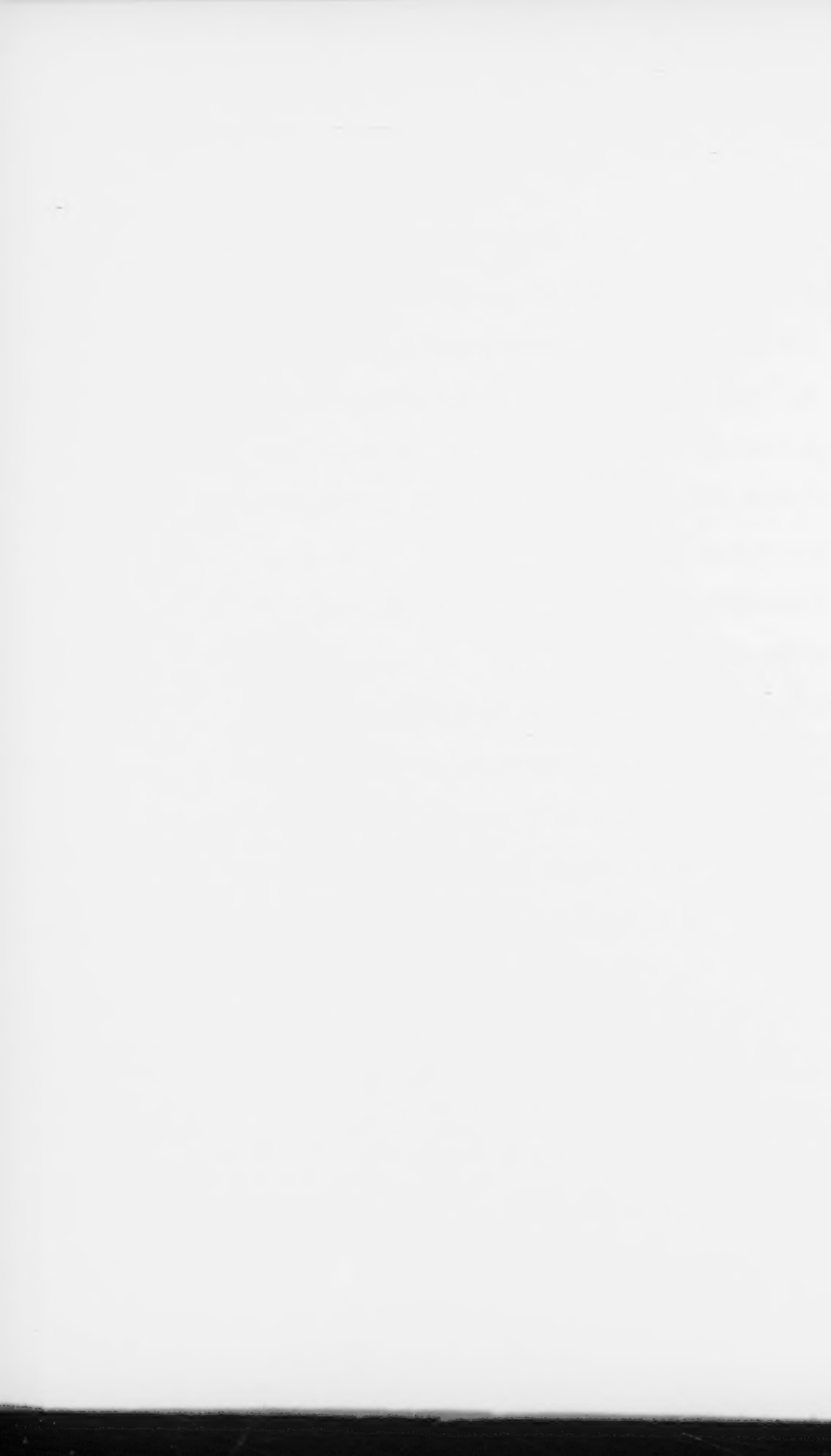
Thus, while the decisions discussed above involve issues substantially similar to those under review here, none are dispositive due to significant factual distinctions. The Johnson case, deals with the promotional scheme indistinguishable from that upheld in Bushey and Talbert, supra, which is

3

While Talbert challenged a promotion upon racial grounds, and Johnson challenged the promotion there on the basis of sex, the issues are otherwise indistinguishable.



distinguishable from the scheme at issue here that eligible candidates were excluded from consideration for promotion by the inclusion of minorities on the promotional list. Additionally, the Court in Johnson stressed the fact that no position was "earmarked" for any underrepresented class as is the situation here. Finally, the drastic scheme sustained in United States v. Paradise was the result of egregious racial discrimination and noncompliance with federal court orders, neither of which are present in the instant case.



CONCLUSION

Due to the significant issues presented, this Petition for Writ of Certiorari should be granted.

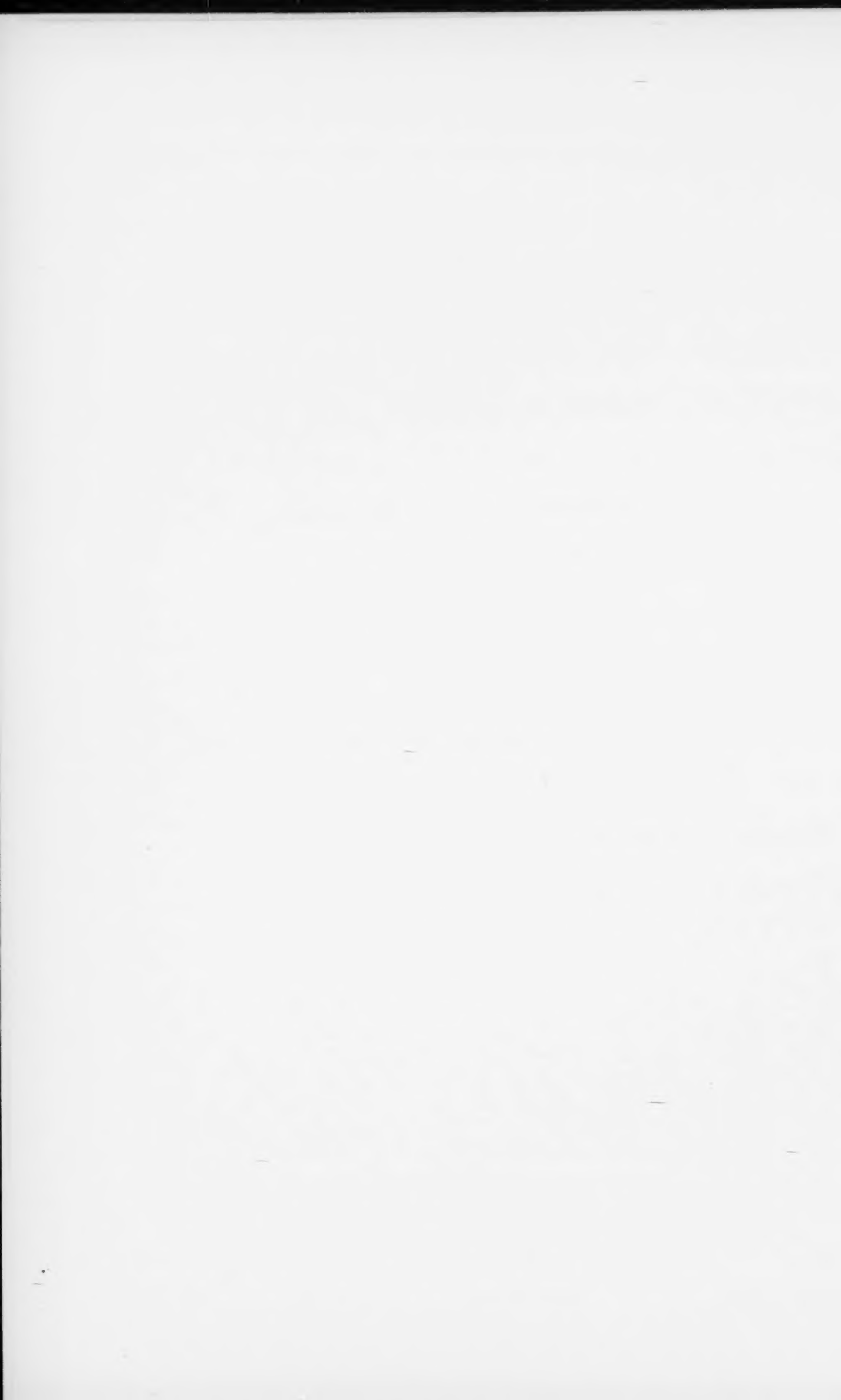
Respectfully submitted,

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Attorneys for Petitioners

*Counsel of Record

February 29, 1988



Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1887

THOMAS J. WISE,

Appellant

versus

ARLINGTON COUNTY, VIRGINIA, et al

Appellees,

UNITED STATES OF AMERICA

Amicus Curiae

No. 86-3095

TERENCE P. MURRAY

Plaintiff-Appellant

versus

ARLINGTON COUNTY VIRGINIA; LARRY J. BROWN
County Manager; ALAN V. CHRISTENSON,
Director of Personnel; WILLIAM K. STOVER,
Chief, Arlington County Police Department

Defendant-Appellees



Appendix "A"

ORDER

Upon reargument in banc this first
day of December, 1987,

IT IS ORDERED that the judgments in
the above-entitled cases are affirmed by
an equally divided court.

For the Court

/s/ HARRISON L. WINTER
Chief Judge



Appendix "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

THOMAS J. WISE)

Plaintiff)

v.)

CIVIL ACTION NO.
85-256-A

ARLINGTON COUNTY,)

et al

Defendants)

ORDER

For the reasons stated from the
bench, it is hereby ORDERED that:

1. The motion of the plaintiff for
summary judgment is denied.

2. The motion of the defendants for
summary judgment is granted, and this
action is dismissed.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
August 2nd, 1985



Appendix "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

TERENCE P. MURRAY)

Plaintiff)

v.) CIVIL ACTION NO.

ARLINGTON COUNTY) 85-248-A
VIRGINIA, et al)

Defendants)

ORDER

The court assumes that race was a factor in the promotion of Gates, Fortune and Jacobs, who are black. Nevertheless the court concludes that it was properly a factor in the selection from among qualified candidates. The plaintiff was qualified, but so were the three who were promoted. The question of who was the most qualified, as evidenced by the scores on the written test, is not determinative. The court further



Appendix "C"

concludes that the affirmative action plan itself, which was designed to correct the effects of past discriminatory actions in the promotion of black police officers, is itself valid. Accordingly, it is hereby

ORDERED that the motion of the defendants for summary judgment is granted, and this action is dismissed.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
June 20th, 1986



Appendix "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

THOMAS J. WISE)

Plaintiff)

v.) CIVIL ACTION NO.

ARLINGTON COUNTY) 85-256-A
VIRGINIA, et al)

Defendants)

ORDER

For the reasons stated in the
Memorandum Opinion this day filed, it is
ORDERED that:

1. Leave is granted the plaintiff
to amend his complaint by substituting 42
U.S.C. § 1981 in the place of 42 U.S.C.
§2000e-5 as a basis for the allegation of
Part IV.A of the complaint.

2. The motion of the defendants for
summary judgment on the amended complaint
for lack of standing is denied.



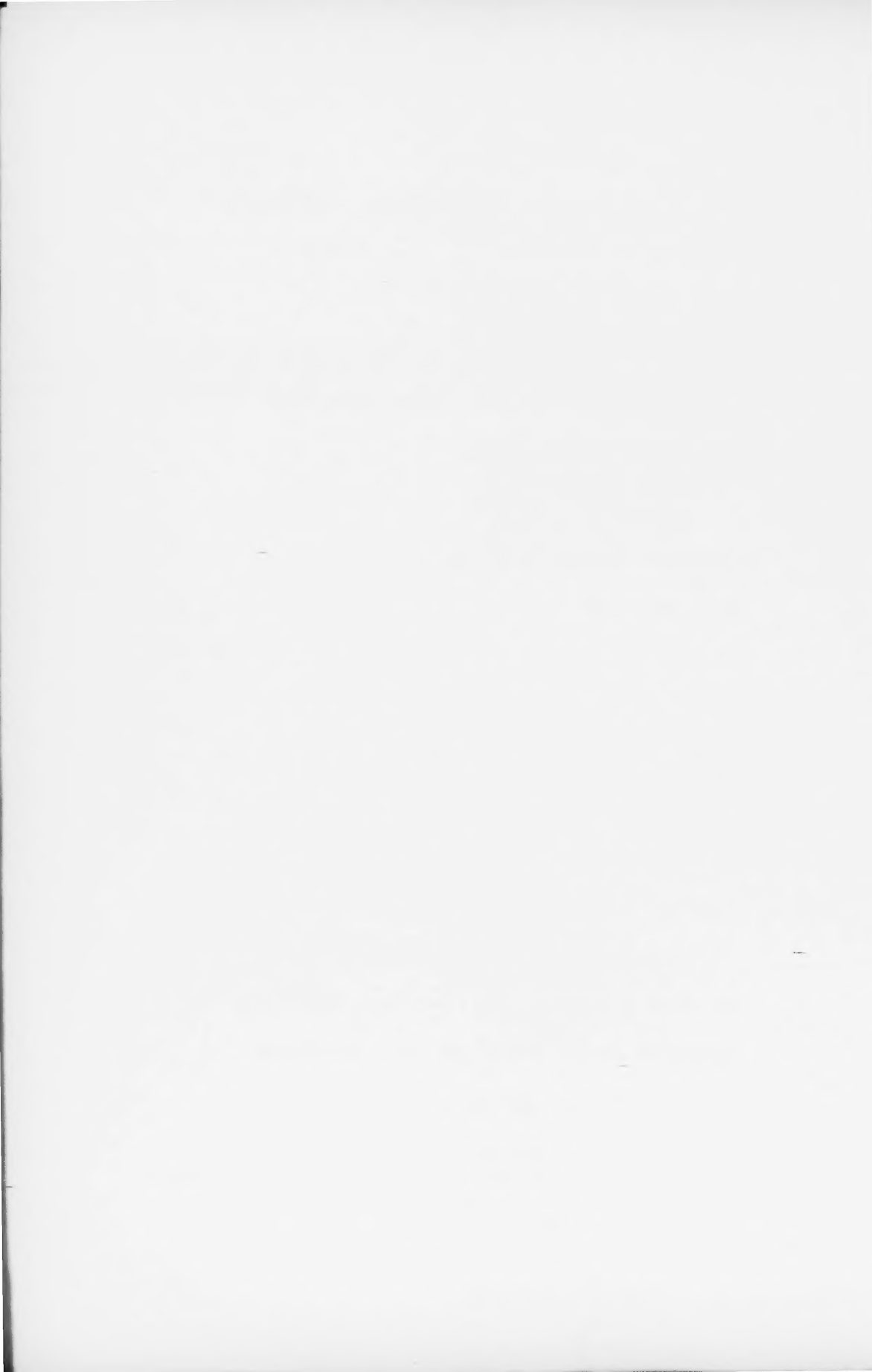
Appendix "D"

3. The motion of the defendants to dismiss Part IV.C of the amended complaint is granted.

4. The motion of the defendants to dismiss Part IV.A of the amended complaint is denied.

5. The motion of the defendants to dismiss those portions of Part IV.B of the amended complaint which allege a denial of access to the test results and a failure to honor the plaintiff's Vietnam Era Veteran's preference is granted. To the extent that Part IV.B of the amended complaint alleges racial discrimination in implementing the Settlement Agreement and in the validity of the eligibility tests, the motion to dismiss Part IV.B of the amended complaint is denied.

/s/ ALBERT V. BRYAN, JR.
United States District Judge
Alexandria, Virginia
May 10th, 1985



Appendix "E"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-1887

THOMAS J. WISE

Appellant

versus

ARLINGTON COUNTY,
VIRGINIA, et al

Appellees

UNITED STATES OF AMERICA

Amicus Cur

O R D E R

It is ORDERED that decision in this case be deferred pending the decision of the Supreme Court in the cases of United States v. Paradise, 85-999, and Johnson v. Transportation Agency, Santa Clara Co. 85-1129, which cases were argued in the Supreme Court November 12, 1986.

Appendix "E"

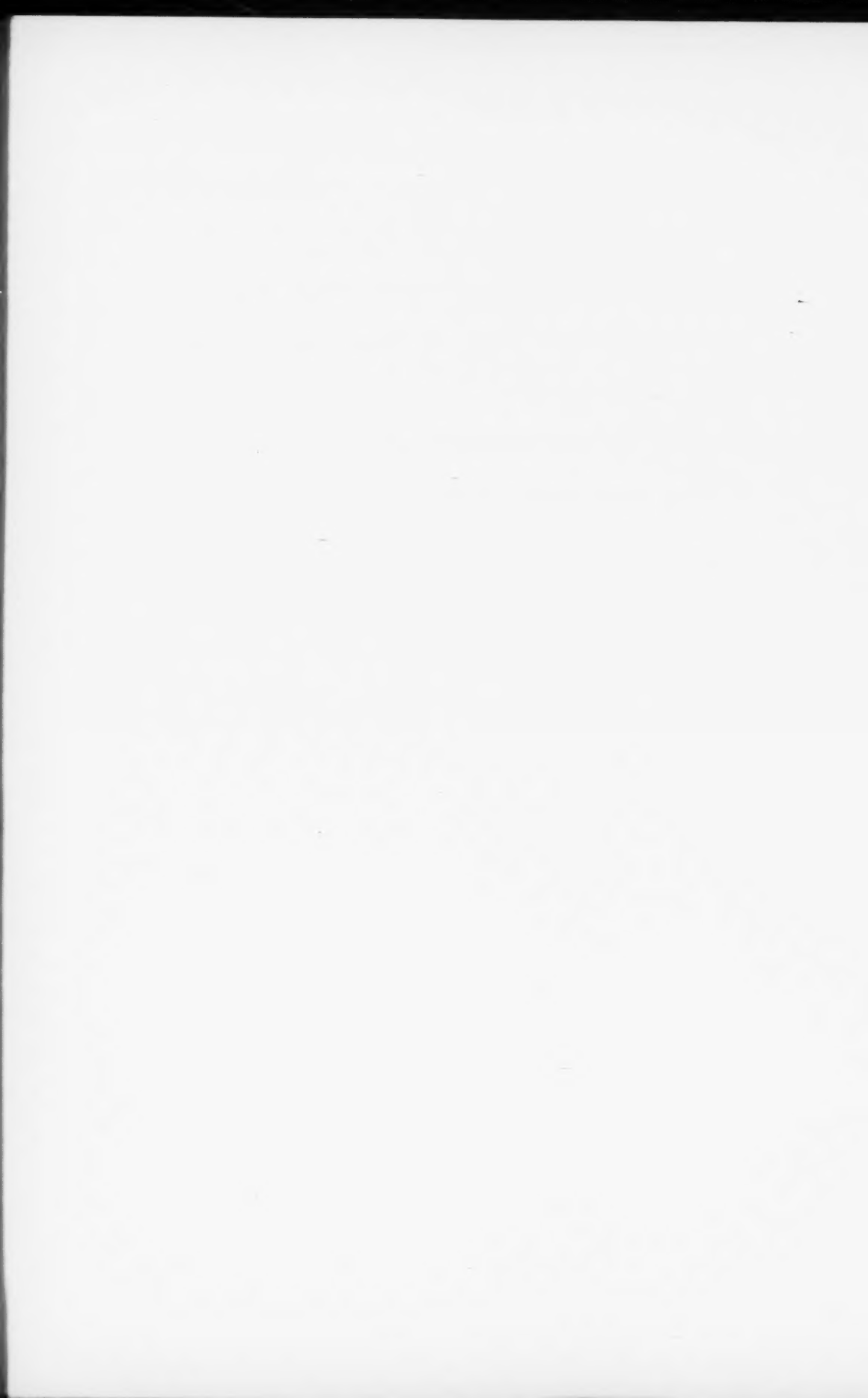
The clerk will place this case on the inactive docket of the court pending said decisions.

With the concurrences of Judge Winter and Judge Russell.

/s/ H.E. Widener, Jr.

JOHN M. GREACEN

For the Court



Appendix "F"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1887(L)

No. 86-3095

THOMAS J. WISE, et al)	Appellants
versus)	
ARLINGTON COUNTY,)	
Virginia, et al)	

Appeals from the United States District
Court for the Eastern District of
Virginia, at Alexandria. Albert V.
Bryan, Jr., Chief District Judge.

In a requested poll of the Court a
majority of judges voted to rehear these
two cases in banc.

Accordingly, IT IS ORDERED that
these cases are consolidated for purposes
of reargument before the in banc court at
the December term of Court (November 30 -
December 4).



Appendix "F"

IT IS FURTHER ORDERED that the parties shall submit twelve additional copies of their briefs and six additional copies of the appendices.

For the Court,

JOHN M. GREACEN, Clerk

AMENDMENT XIV

Section 1.

[Citizenship Rights Not to Be Abridged
by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1981: EQUAL RIGHTS UNDER THE
LAW

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.